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adherence to the Statute and admission of the terms of the oral contract for the purpose of measuring damages. Since this does not violate the policy and purpose of the Statute, it would seem more logical and equitable to award the specific thing promised rather than to attempt its measurement in damages. In doing so, the statutory policy and purpose would be preserved equally as well. It is submitted that the Kentucky court has adopted the preferable position.

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Workmen's Compensation—Neutral Risks—Causal Relation Between Employment and Injury.

The workman's compensation statutes of most states prescribe as one of the requirements of compensability that an injury must "arise out of" the employment[1] of the worker, thus demanding a causal relation between the job and the injury. Professor Larson has adopted a useful threefold classification of the tests employed by the courts to determine if an injury meets this requirement. Risks are designated as personal, job related and neutral.[2] An injury resulting from personal risk is one completely unrelated to the employment and therefore not compensable.[3] The injury from a job related risk is strictly confined to the hazards of employment and is always compensable.[4] The third category, neutral risk, includes all risks not personal or job related.[5] The establishment of the causal relation, the "arising out of" the employment, is a difficult problem in these neutral risk injuries. In determining compensability in such cases the courts have used three theories—increased risk, actual risk and positional risk. This note will examine each of these theories and will attempt to determine the present position of North Carolina in this area.

In *Pope v. Goodsen*[6] a carpenter took shelter during a storm in a partially completed building. He was wet from the rain and had a nail pouch around his waist. As he stood near the window, lightning struck the house, traveled down the window frame and passed through

[1] *E.g.*, N.C. GEN. STAT. § 97-2(6) (1958); S.C. CODE § 72-14 (Supp. 1959); VA. CODE ANN. § 65-7 (1950). *Contra*, N.D. REV. CODE § 65-0102(8) (1957); UTAH CODE ANN. § 35-1-44 (1953). For a discussion of "arising out of," see Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

[2] 1 LARSON, WORKMEN'S COMPENSATION § 7 (1952).

[3] Compensation was denied to an employee assaulted while working, where the assault was motivated by domestic difficulties. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930).

[4] Compensation is so clearly appropriate that the issue is seldom litigated. For instance, if an operator of a saw were injured by a malfunction in that tool, the risk is clearly job related.

[5] In neutral risks the cause of the harm may be known or unknown; this note treats only the former type cases.

[6] 249 N.C. 690, 107 S.E.2d 524 (1959).

the nail pouch and the legs of the carpenter, causing his death. In allowing compensation under the statute[7] the court stated:

> The generally recognized rule is that where the injured employee is by reason of his employment peculiarly or specially exposed to risk of injury from lightning—that is, one greater than other persons in the community,—death or injury resulting from this source usually is compensable as an injury by accident arising out and in the course of the employment.[8]

The court followed the well-established majority rule[9] in allowing compensation because of the increased risk to the employee. The determining factor in granting compensation under the increased risk is the greater likelihood of injury to the worker than to the general public; if his employment subjected the employee to the additional danger, compensation is allowed.

There is no uniformity among courts which adhere to the increased risk theory; opposite results have been reached on indistinguishable fact situations,[10] due to differences in defining the scope of the term "general public." The Massachusetts court denied compensation to a laborer whose foot was frozen while working outside before dawn in extremely cold weather. The court stated, "In the performance of his work, there is nothing to show that the employee was exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather."[11] On the other hand, in allowing compensation to the widow of an employee who died from a heatstroke, the Texas court took a more liberal view: "In the case before us the very work which the deceased was doing for his employer exposed him to greater hazard from heatstroke than the general public was exposed to for the simple reason that the general public were not pushing wheelbarrow loads of sand in the sun on that day."[12]

Increased risk has been found where the employment of the worker has merely exposed him to the elements (or whatever the harmful force). Thus, increased risk of sunstroke was found by the Oklahoma court

[7] N.C. GEN. STAT. § 97-2(6) (1958).

[8] 249 N.C. at 692, 107 S.E.2d at 525. Deceased was "specially exposed" because he was wet and wearing a nail pouch.

[9] *E.g.*, Bales v. Covington, 312 Ky. 551, 228 S.W.2d 446 (1950); Kaiser v. Industrial Comm'n, 136 Ohio St. 440, 26 N.E.2d 449 (1940); Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952). See generally 58 AM. JUR. *Workmen's Compensation* § 260 (1948); 71 C.J. *Workmen's Compensation* § 469 (1935); 99 C.J.S. *Workmen's Compensation* § 249 (1958).

[10] An employee took shelter under a tree during a thunder storm and was struck by lightning; increased risk was found in Nelson v. Country Club, 329 Mich. 479, 45 N.W.2d 362 (1951). *Contra,* DeLuca v. Board of Park Comm'rs, 94 Conn. 7, 107 Atl. 611 (1919).

[11] Robinson's Case, 292 Mass. 543, 545-46, 198 N.E. 760, 761 (1935).

[12] American Gen. Ins. Co. v. Webster, 118 S.W.2d 1082, 1085-86 (Tex. Civ. App. 1938).

when the work merely required that the employee be in the sun.[13] In most cases, however, there is an additional hazard more directly connected with the job. Heat from molten lead,[14] reflected heat and deflected breeze,[15] and objects which attract lightning[16] have been found to be such additional factors. In the single case[17] involving heatstroke which has reached the North Carolina Supreme Court, the evidence showed that the employee had been working with molten lead which had raised slightly the surrounding temperature. The court allowed compensation but indicated that had the additional factor not been present recovery would have been denied. The increased risk theory has received general acceptance throughout the United States and has been applied to accidents caused by lightning,[18] exposure,[19] windstorms,[20] earthquakes,[21] and other neutral risks.[22]

While professing to follow the increased risk rule, some courts[23] have developed the contact-with-the-premises exception.[24] Under this exception when the worker has been injured by contact with part of his occupational surroundings, regardless of the actuating force, sufficient causal relation has been established and increased risk need not be shown. This doctrine is illustrated by the statement, "If the bomb injures a

[13] The truck driven by the employee ran out of gas, and he suffered a sunstroke while walking to a service station. Garfield County v. Best, 289 P.2d 677 (Okla. 1955).

[14] Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

[15] McNeil v. Omaha Flour Mills Co., 129 Neb. 329, 261 N.W. 694 (1935).

[16] Stout v. Elkhorn Coal Co., 289 Ky. 736, 160 S.W.2d 31 (1942).

[17] Fields v. Tompkins-Jenkins Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

[18] Fort Pierce Growers Ass'n v. Storey, 158 Fla. 192, 29 So. 2d 205 (1947); Stout v. Elkhorn Coal Co., 289 Ky. 736, 160 S.W. 2d 31 (1942); Bauer's Case, 314 Mass. 4, 49 N.E.2d 118 (1943); State v. Ramsey County Dist. Court, 129 Minn. 502, 153 N.W. 119 (1915); Sullivan v. Roman Catholic Bishop, 103 Mont. 117, 61 P.2d 838 (1936).

[19] Vukovich v. Industrial Comm'n, 76 Ariz. 187, 261 P.2d 1000 (1953); Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320 (1916); Murphey v. I.C.U. Constr. Co. 158 Kan. 541, 148 P.2d 771 (1944); Nelson v. District Court, 138 Minn. 260, 164 N.W. 917 (1918).

[20] Reid v. Automatic Elec. Washer Co., 189 Iowa 964, 179 N.W. 323 (1920); Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 Pac. 72 (1922); Scott County School Bd. v. Carter, 156 Va. 815, 159 S.E. 115 (1931); Scandrett v. Industrial Comm'n, 235 Wis. 1, 291 N.W. 845 (1940).

[21] London Guar. & Acc. Co. v. Industrial Acc. Comm'n, 202 Cal. 239, 259 Pac. 1096 (1927); Enterprise Dairy Co. v. Industrial Acc. Comm'n, 202 Cal. 247, 259 Pac. 1099 (1927).

[22] Borgeson v. Industrial Comm'r, 368 Ill. 188, 13 N.E.2d 164 (1938) (stray bullet); Lexington Ry. Sys. v. True, 276 Ky. 446, 124 S.W.2d 467 (1939) (stray bullet); Plemmons v. White's Serv., Inc., 213 N.C. 148, 195 S.E. 370 (1938) (bitten by mad dog).

[23] Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940); Dunnigan v. Clinton Falls Nursery Co., 155 Minn. 286, 193 N.W. 466 (1923); Industrial Comm'n v. Hampton, 123 Ohio St. 500, 176 N.E. 74 (1931); Brooker v. Borthwick & Sons (Australasia), Ltd., [1933] A.C. 669 (N.Z.).

[24] This exception could fit the actual risk theory also, but only courts following the increased risk rule have utilized it. Courts using positional risk would find causation from the fact that the employee was on the job.

workman directly he must show special exposure; if it injures him indirectly by bringing the roof down on him, he can recover unconditionally."[25]

While the contact-with-the-premises exception has not been applied in North Carolina to an injury caused by an act of God, the court apparently used this theory in allowing recovery in *Perkins v. Sprott.*[26] In that case the employee suffered an injury when a baseball broke the window of the truck he was driving and the shattered glass struck him in one eye. In its brief opinion the court did not mention increased risk but stressed the fact that the glass rather than the baseball actually caused the injury. The decision clearly implies that compensation would not have been allowed if the baseball itself had struck the employee.[27] However, in *Walker v. J. D. Wilkins, Inc.*[28] an employee was injured when a tornado blew down the building in which he was working. The injuries were caused by the falling debris, but compensation was not granted because no increased risk was found.[29] This decision would seem to be in conflict with the position taken in *Sprott,* but in *Walker* neither the opinion of the court nor the briefs of the parties mentioned the contact-with-the-premises exception.

The actual risk theory is a more liberal approach to the problem of determining causal relation. Recovery is allowed if the employment exposed the worker to a risk of the injury, and the likelihood of similar harm to others in the community is not examined.[30] This theory is especially applicable to exposure cases, as the danger of freezing or sunstroke is common to many people in a designated area. An employee who suffers a heatstroke while working in the hot sun might be denied recovery under the increased risk theory, since everyone in the area is subjected to the same risk.[31] The actual risk theory would allow com-

[25] Brooker v. Borthwick & Sons (Australasia), Ltd., [1933] A.C. 669, 678 (N.Z.).

[26] 207 N.C. 462, 177 S.E. 404 (1934).

[27] "The injury to the plaintiff employee was the glass that hit him in the eye. The baseball did not hit him." *Id.* at 464, 177 S.E. at 405. Compensation was denied in two similar cases where a bullet struck the employee's eye directly. Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931).

[28] 212 N.C. 627, 194 S.E. 89 (1937).

[29] The contact-with-the-premises exception was utilized in allowing recovery on similar facts in Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940).

[30] Harding Glass Co. v. Albertson, 208 Ark. 866, 187 S.W.2d 961 (1945) (glass cutter died from heat stroke); McKiney v. Reynolds & Manley Lumber Co., 79 Ga. App. 826, 54 S.E.2d 471 (1949) (worker in lumber yard struck by lightning); Hughes v. Saint Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927) (grave digger suffered heat stroke); Deziley v. Semet-Solvay Co., 272 App. Div. 985, 72 N.Y.S.2d 809 (1947) (struck by lightning while going to job); Eagle River Bldg. & Supply Co. v. Peck, 199 Wis. 192, 225 N.W. 690 (1929) (foot frozen in extreme weather).

[31] In denying compensation to a coalheaver who suffered a sunstroke, the court stated, "It is urged that physical labor has a tendency to induce sunstroke. No doubt it has, but physical labor is not a hazard peculiar to a coalheaver." Lewis v. Industrial Comm'n, 178 Wis. 449, 453; 190 N.W. 101, 102 (1922).

pensation because the employment required the employee to work in the sun and subjected him to the danger of sunstroke.[32] This theory eliminates the problem found in the increased risk doctrine of defining the scope of the term "general public."

The positional risk theory is the third and most liberal approach to the problem; compensation is allowed when the employment caused the worker to be in the position where the injury was received, irrespective of the risk involved.[33] The Colorado court in *Aetna Life Ins. Co. v. Industrial Comm'n*[34] allowed recovery for the death of a farm hand killed by lightning. A concurring opinion summarized the holding and illustrated this theory by stating:

> An affirmance . . . established the rule that when one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any person then and there present would have met irrespective of his employment, that accident is one "arising out of" the employment of the person so injured.[35]

The North Carolina Supreme Court has been presented with two cases[36] in which the application of the positional risk doctrine would have allowed recovery.[37] In both an employee had been struck by a stray bullet, and in both compensation was denied because of the absence of increased risk.

In summary, North Carolina has adhered to the increased risk theory by using comparative danger between the worker and the general public to determine if causation exists between the injury and the employment.[38] The term "general public" has been interpreted liberally, how-

[32] In granting compensation to an employee who suffered a heatstroke, the court stated, "Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk." Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 202, 156 N.E. 665 (1927).

[33] Aetna Life Ins. Co. v. Industrial Comm'n, 81 Colo. 233, 254 Pac. 995 (1927) (farm hand struck by lightning); Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, 6 So.2d 747 (1942) (cyclone demolished building and injured employee); Gargiulo v. Gargiulo, 24 N.J. Super. 129, 93 A.2d 598 (1952) (struck by arrow shot by child); Nash-Kelvinator Corp. v. Industrial Comm'n, 266 Wis. 81, 62 N.W.2d 567 (1954) (assaulted by fellow employees for signing peace petition).

[34] 81 Colo. 233, 254 Pac. 995 (1927).

[35] *Id.* at 236, 254 Pac. at 996.

[36] Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931).

[37] See Truck Ins. Exch. v. Industrial Accident Comm'n, 147 Cal. App. 2d 460, 305 P.2d 55 (Dist. Ct. App. 1957); Gargiulo v. Gargiulo, 24 N.J. Super 129, 93 A.2d 598 (1952).

[38] Special danger was found where a night watchman was killed by an unknown assailant. West v. East Coast Fertilizer Co., 201 N.C. 556, 160 S.E. 765 (1931). Compensation was denied on the ground that the risk was common to the neighborhood in Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938) (employee slipped on fruit peel in employer's parking lot). Increased risk was found in Pope v. Goodsen, 249 N.C. 690, 107 S.E.2d 524 (1959), and Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

ever to mean all persons in the general vicinity, not just those doing the same or similar work.[39] The status of the contact-with-the-premises exception is unclear due to an apparent conflict in holdings.[40] Neither the actual[41] nor the positional[42] risk theory has been adopted by the court.

JAMES H. CARSON, JR.

Wrongful Death—Measure of Damages—Evidence of Retirement Income.

In the recent case of *Bryant v. Woodlief*[1] the North Carolina Supreme Court held that evidence of railroad retirement payments received by the decedent is admissible on the issue of damages in a wrongful death action.[2] This holding[3] and the court's incidental discussion of the measure of damages in North Carolina raises two questions. First, how far will the court extend the holding in *Bryant,* which seemingly is in conflict with prior decisions, to other types of income similar to that involved in the principal case? Secondly, what inference can be drawn from the inconsistency reflected in the court's discussion in *Bryant?*

The evidence admitted in the principal case is difficult to reconcile with the tacit rule of past cases that wrongful death damages in North

[39] See Pope v. Goodsen, *supra* note 38; Fields v. Tompkins-Jenkins Plumbing Co., *supra* note; 38 Plemmons v. White's Serv., Inc., 213 N.C. 148, 195 S.E. 370 (1938).

[40] Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931). The application of the exception could leave the court in an illogical position if a case ever arose where one eye was injured directly by an object and the other eye injured by shattered glass from a window. Apparently compensation would be awarded for injury to one eye under the premises exception but disallowed for the other under the increased risk theory.

[41] The language in Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945), strongly indicates that no recovery would be allowed for a heatstroke suffered on a hot day unless some additional harmful factor were present. The actual risk theory would require nothing more than labor in the hot sun. Compare Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927).

[42] Utilization of the positional risk doctrine would have allowed compensation in Whitely v. Highway Comm'n, 201 N.C. 466, 160 S.E. 827 (1931).

[1] 252 N.C. 488, 114 S.E.2d 241 (1960).

[2] Heskamp v. Bradshaw's Adm'r, 294 Ky. 618, 172 S.W.2d 447 (1943), was relied upon in the principal case. Kentucky's death statute, KY. REV. STAT. § 411.130 (1959), has been construed to provide recovery for "loss to the estate." Chesapeake & O. Ry. v. Bank's Adm'r, 153 Ky. 629, 156 S.W. 109 (1913). The North Carolina statute, N.C. GEN. STAT. § 28-174 (1950), is given the same construction. Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946).

[3] Other jurisdictions have reached the same result; Kowtko v. Delaware & Hudson R.R., 131 F. Supp. 95 (M.D. Penn. 1955) (training subsistence payments from the Veterans Administration); Barrow v. Lence, 17 Ill. App. 2d 527, 151 N.E.2d 120 (1958) (monthly pension); Trust Co. v. Cummings, 320 Ill. App. 437, 51 N.E.2d 616 (1943) (old age assistance); Jessee v. Slate, 196 Va. 1074, 86 S.E.2d 821 (1955) (monthly social security payments). And the measure of damages used is not determinative of the question of the admissibility of such evidence. Virginia, for example, allows such evidence and its measure is "loss to certain near relatives." Conrad v. Thompson, 195 Va. 714, 80 S.E.2d 561 (1954).